UNITED STATES
v.
RICHARD W. DUMMAR, ET AL.

IBLA 72-357 Decided February 13, 1973

Appeal from the decision of Administrative Law Judge Graydon E. Holt holding that four lode mining claims are null and void. (Contest No. R-2451)

Affirmed and adopted.

Administrative Practice--Administrative Procedure: Generally--Mining Claims: Contests--Mining Claims: Determination of Validity

The United States, acting by and through the Secretary of the Interior, is lawfully empowered to initiate a contest pursuant to the Administrative Procedure Act for the purpose of determining the validity of any unpatented mining claim(s) located on federally owned lands, and where, upon the hearing of such contests, the Government makes a prima facie showing of invalidity which is unrefuted by the contestees, the Administrative Law Judge is obliged to hold the claim(s) to be null and void, and this procedure does not violate constitutional guarantees of due process, the General Mining Law or the Administrative Procedure Act. Presentation of the contestant's case by counsel employed by the Forest Service is not an illegal transfer of the authority of the Secretary of the Interior.

Mining Claims: Discovery: Generally

To constitute a discovery of a valuable mineral deposit on a lode mining claim it is not sufficient merely to demonstrate that there is a mineral showing which would warrant further exploration, and the willingness of the mining claimant to expend further time, labor and money in such exploration is not indicative of the discovery, or even the existence, of a valuable mineral deposit.

APPEARANCES: George W. Nilsson, Esq., Los Angeles, California, for the appellants.

OPINION BY MR. STUEBING

Richard W. Dummar and A. K. Dummar have appealed from the March 7, 1972, decision of the Administrative Law Judge 1/, holding that the Opportunity Subsection Nos. 1, 2, 3, and 4 lode mining claims are null and void.

Appellants contend that the contest procedure and the result thereof violate several provisions of the Constitution of the United States, the General Mining Law, and the Administrative Procedure Act, that the conclusion is contrary to the evidence, that the burden of proof was improperly imposed, and that the contest is illegal because the contestee's case was presented by counsel employed by the Forest Service rather than by the Department of the Interior.

These arguments have been advanced in many prior instances and have been found consistently to be without merit. The United States, acting by and through the Secretary of the Interior, is lawfully empowered to initiate a contest pursuant to the Administrative Procedure Act for the purpose of determining the validity of any unpatented mining claim(s) located on federally owned lands. Cameron v. United States, 252 U.S. 450 (1919); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); United States v. Coleman, 390 U.S. 599 (1968); Adams v. United States, 318 F.2d 861 (9th Cir. 1963); Converse v. Udall, 399 F.2d 616 (9th Cir. 1968). Where, upon the hearing of such contests, the Government makes a prima facie showing of invalidity which is unrefuted by the contestees, the Administrative Law Judge is obliged to hold the claims to be null and void. Foster v. Seaton, 271 F.2d 836 (1959); United States v. Richard M. Lease, 6 IBLA 11, 79 I.D. 379 (1972); United States v. Calla Mortenson, 7 IBLA 123 (1972); United States v. Ray Guthrie, 5 IBLA 303 (1972); United States v. L. B. McGuire, 4 IBLA 307 (1972). This procedure does not violate constitutional guarantees of due process, the General Mining Law or the Administrative Procedure Act. United States v. Raymond Bass, et al, 6 IBLA 113 (1972); United States v. William A. McCall, Sr., 7 IBLA 21, 79 I.D. 457 (1972); United States v. Dredge Corp., 7 IBLA 136 (1972); United States v. Glen S. Gunn, et al., 7 IBLA 237, 79 I.D. 588 (1972); United States v. Curtis H. Springer, et al., 8 IBLA 123 (1972). Presentation of the contestant's case by counsel employed by the Forest Service is not an illegal transfer of the authority of the Secretary of the Interior. United States v. Raymond Bass, et al., supra; United States v. Robert B. Sainberg, 5 IBLA 270 (1972); See Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

1/ The change of title of the hearing officer from "hearing examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

We further find that the decision of the Administrative Law Judge accurately relates the facts and the applicable law, and reaches a
proper conclusion based thereon.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we hereby affirm the decision of the Administrative Law Judge, a copy of which is appended as Appendix A, and adopted as the decision of this Board.

_____
Edward W. Stuebing, Member

We concur:

_____
Newton Frishberg, Chairman

_____
Joan B. Thompson, Member

APPENDIX A

March 7, 1972

DECISION

United States of America, Contestant	:	Contest No. R-2451
	:	Involving Opportunity Sub-
v.	:	Section Nos. 1, 2, 3, and 4
	:	lode mining claims, located
Richard W. Dummar,	:	in Sec. 32, T. 27 S., R. 33 E.,
A. K. Dummar, Contestees	:	M.D.M., Kern County, California

Mining Claims Declared Null and Void

This proceeding was initiated by the Bureau of Land Management at the request of the Forest Service through the filing of a complaint in the Riverside District and Land Office on September 8, 1969. In the complaint the contestant alleged:

(a) There are not disclosed within the boundaries of the mining claims minerals of a variety subject to the mining laws, sufficient in quantity, quality, and value to constitute a discovery.

(b) The land embraced within the claims is non-mineral in character.

The mining claimants filed a timely answer in which these allegations were effectively denied.

Thereafter, a hearing was held in Los Angeles, California on May 13, 1971. The contestant was repres ented by Charles F. Lawrence, Attorney, Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California. The contestees appeared in their own behalf. The witnesses were Wesley Moulton, a mining engineer employed by the Forest Service, and Richard and Arnold Dummar. Both of the contestees have been engaged in mining for a number of years in Nevada and California.

The claims are located in the Piute Mountain approximately 50 miles east of Bakersfield. Gold and silver were first found in the area in 1865. During the depression days a great many people lived in the area and

prospected the entire mountain. Now the mountain is pockmarked with prospect holes and pits. There are a number of claims that have had production in the area, including the Grant claim located three or four miles east of the claims in issue; the Geringer Brothers' claims approximately ten miles to the south; the Mary Ellen mine across the mountain; and the Brown claims three miles to the north. The Opportunity Sub-Section claims were located by the contestees on October 1, 1964. Previous owners of claims covering the same land were Jimmy Doolittle and the Ross Brothers. The Ross Brothers were on the land during the depression years and they made a living out of their mining activities in the area.

Mr. Moulton was on the claims with Mr. Richard Dummar on July 27, 1968. He examined the improvements, particularly the long adit on claim No. 4. He took samples from all the claims and had them assayed for gold and silver. At the face of the adit on claim 4 he found a vein containing a deposit of stibnite, an antimony ore, which had been mined but only a few hundred pounds remain. Stibnite has been found in the Piute Mountain area in pockets. One such pocket was found in the Grant mine in 1918 and produced $13,000 of ore. At the same mine a second pocket was found in 1933 containing 2,750 pounds of 33-1/2% antimony. A third pocket was found in 1943 which contained a ton of 11% antimony (Tr. 25). The assay certificates for the gold and silver samples showed negligible values (Ex. 7). The assay certificate for the two stibnite samples showed 26.6 and 45.9 percent antimony by weight (Ex. 6). While this is a substantial percentage in antimony the remaining volume in the pocket is small. Mr. Moulton suggested that you could spend years looking for another pocket and never find one (Tr. 26). He testified that the gold production in the area was from small veins. At times they can be extremely rich but in the entire Piute Mountain there have been only a few mines that have had respectable production (Tr. 26). From his examination, and the results of his assays, Mr. Moulton concluded that any further prospecting on the claims would be an extremely chancy operation. He stated that from the looks of the area, the limited minerals on the claims, and the past history of the Piute Mountain the group of claims make a poor prospect. He does not think that anybody would be justified in spending further money on the group in the hope of making a paying mine (Tr. 31).

The contestees testified that they are not relying on gold and silver as the minerals of discovery but are relying on the antimony or the stibnite found in the 300 foot adit on claim 4 (Tr. 69). The stibnite deposit was in a pocket along a vein from 7 to 12 inches wide. They removed two tons of this material and sold it for $600 or $700. Although the vein has disappeared, there is still a stringer left (Tr. 53), and they both feel that if they follow this stringer for another 5 to 20 feet, they might hit a valuable pocket. In commenting on the stringer of stibnite Richard Dummar stated that they had discussed the material with an engineer employed by Eisenhauer Laboratories in Los Angeles. This engineer told them "Listen, gentlemen, you can follow that little stringer 5, 10, or 20 feet and you might hit a pocket in there worth $90,000. Who knows?" (Tr. 53).

On claim 4 approximately 30 feet from the portal to the adit there is a ledge 50 to 70 feet wide and within the ledge there is yellow quartz which contains values of $3.90 a ton in gold and silver (Tr. 45). When asked whether this ledge material could be processed Arnold Dummar responded (Tr. 47):

> "I don't think you can right now, but who knows, maybe five years from now what happens? This property is potentially valuable. This is the only thing that I am saying. It has a potential. I can remember when gold wasn't worth anything unless it ran we will say several hundred or possibly two or three or five hundred dollars a ton. It wasn't worth anything because you had to carry it out of the mountain on the back of a burro. You had to carry your tools in on a burro, you lived under adverse conditions in order to mine that, but it don't necessarily have to be that valuable today. You can commercially mine and process $10.00 a ton ore today. $10.00 a ton ore is valuable if you have sufficient quantity. This is what I am pointing out."

Both of the contestees expressed the opinion that the claims are on the right formation and that they are very valuable prospects. They believe that if they continue their efforts, there is a good chance of exposing a valuable deposit (Tr. 63-65).

The parties were equally aware of the amount of minerals on the claims. The Government witness concluded that the minerals did not constitute a good prospect and were not sufficient to justify development with a reasonable prospect of success. The contestees based their opinion on very similar evidence, and although they have lost a considerable amount of money on the claims in the last six years, they concluded that the claims constituted a fine prospect. They are willing to continue their prospecting and exploring on the claims in an attempt to expose recoverable ore. The question that developed as the result of these adverse viewpoints is whether there is sufficient evidence of mineralization to satisfy the discovery requirement of the mining law.

The mining law requires the discovery of a "valuable mineral deposit" to validate a mining claim, 30 U.S.C. § 23 (1964). In determining whether there has been such a discovery the Department and the Courts long ago developed what has come to be called the "prudent man" test, much as the Courts have developed the "reasonable man" test to guide the fact finder in negligence cases. This rule originally set forth in Castle v. Womble, 19 L.D. 455 (1894), affirmed in Chrisman v. Miller, 197 U.S. 313 (1905) and recently reaffirmed in United States v. Coleman, 390 U.S. 597 (1968), is worded as follows:

> Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

The contestees contend that there are valuable minerals on the claims in sufficient quantities to induce further prospecting and exploration and that this is sufficient to satisfy the mining law.

This contention has been rejected by the Department and the Courts on numerous occasions. See Converse v. Udall, 399 F. 2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1029 (1969); Henault Mining Co. v. Tysk, 419 F. 2d 766 (9th Cir. 1969), cert. denied, 398 U.S. 950 (1970); United States v. Emerald Empire Mining Company, A-30445 (Dec. 3, 1965); United States v. Adam J. Flurry, A-30887 (March 5, 1968). Also see United States v. New Mexico Mines, Inc., 3 IBLA 101 (Aug. 18, 1971) wherein the Board listed the decisions in which it held that "evidence of mineralization which is only sufficient to warrant further exploration is not enough to establish a discovery under the mining law." For assistance in determining the issue of discovery in the latter decision, the Board offered the following definitions:

> "Exploration," within this context, is the process of searching for a valuable mineral deposit. The finding of mineralization of sufficient value to encourage further exploration does not successfully conclude the exploratory process or constitute a discovery.
>
> "Discovery," to paraphrase the definition in Castle v. Womble, supra, occurs upon the finding of a mineral deposit revealed to be of sufficient qualitative and quantitative value to warrant the expenditure of effort to develop a mine in the reasonable anticipation that a profitable mining operation will result.
>
> "Development" refers to the physical work incident to the excavation of a mine for the extraction of the mineral values discovered. After discovery, certain exploratory activities incident to the actual production of the minerals are regarded as "development" rather than "exploration." These would include the blocking out of the ore body, testing for engineering feasibility, determining the strike and dip of the vein beyond the extent of the qualifying knowledge, and related activities.

The Government presented a prima facie case through the testimony of a mining engineer that there is not now sufficient mineral exposed to induce a prudent man to expend his labor and means on a development program with a reasonable prospect of success in developing a paying mine. The contestees went no further than to establish that they were willing to expend their labor and means on the claims in the hope of finding a body of ore which could be recovered profitably. This falls far short of overcoming the Government case or of proving that there has been a discovery of a valuable mineral deposit on any one of the claims.

Accordingly, the Opportunity Sub-Section Nos. 1, 2, 3, and 4 lode mining claims are declared null and void.

Graydon E. Holt
Hearing Examiner

Enclosure: Appeal Information

Distribution
Regional Attorney, U.S. Dept. of Agriculture, 630 Sansome Street, San Francisco, Calif. 94111 (Cert.)
Richard W. Dummar, 14709 South Fleming Avenue, Bellflower, Calif. 90706 (Cert.)
A. K. Dummar, 5457 Olive Street, Long Beach, Calif. 90805 (Cert.)

Standard Distribution